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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1951. No. 128.

ROBERT RISBERG,

Petitioner,

v.

DULUTH, MISSABE & IRON RANGE RAILWAY COMPANY,

Respondent.

PETITION AND BRIEF, AMICI CURIAE, OF WAREHOUSE EMPLOYEES UNION, LOCAL 169, A. F. of L. (Freight Handlers); UNITED RAILROAD WORKERS OF AMERICA, C. I. O. (Carmen, Car Inspectors, Cleaners, Repairmen, Engine Watchers, Trackmen); BROTHERHOOD OF LOCOMOTIVE ENGINEERS, READING COMPANY; BROTHERHOOD OF LOCOMOTIVE ENGINEERS, HUDSON & MANHATTAN R. R. CO. (Engineers, Firemen, Hostlers); ORDER OF RAILWAY CONDUCTORS, PENNSYLVANIA RAILROAD LINES EAST (Conductors, Brakemen, Switchmen); INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. of L., READING SYSTEM (Electricians, Derrickmen, Power Machinery Men, Winchmen).

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named labor unions beg leave to intervene and file a brief, amici curiae, because of the immense importance of the issue involved.

The sole question to which we direct our attention is whether the various Safety Appliance Laws of the United States, incorporated within 45 U. S. C. A., §§1 to 23, inclusive, and such regulations and rules promulgated thereunder by the Interstate Commerce Commission of the United States are applicable to railroad equipment such as cars, tenders and locomotives, when such equipment has been placed by a common carrier by rail, engaged in interstate commerce, on the private siding of an industrial plant, quarry, mine or waterfront, for loading or unloading. The issue is whether a railroad company is liable for injuries sustained by reason of a violation of the Safety Appliance Laws or of a Commission regulation, not only to its own employees who may sustain injury while the car is on tracks not owned by the employer railroad, but also to employees of another industry or of independent contractors who are injured while properly on such railroad equipment for the purpose of loading or unloading. In the instant case the court below has ruled that such equipment is not "in use" within the meaning of the statute when the car is upon an industrial track not owned by the railroad company.

This is a novel, violent interpretation of the law, and completely contradictory to all judicial holdings heretofore expressed in state courts throughout the United States, as well as in federal courts, and indeed, this very court.

It is respectfully suggested that the opinion of the Supreme Court of Minnesota misconstrues the meanings of the opinions of this court in *Brady v. Terminal Railroad Association*, 303 U. S. 10 (1938) and *Brady v. Wabash Ry. Co.*, 329 Mo.

1123, 49 S. W. 2d 24, cert. den. 287 U. S. 619 (1932). We understand those cases to mean merely that *as between the two railroads, the car* was not yet "in use" on the Wabash system, since Wabash had not yet accepted the car from the Terminal Railroad Association. This meant that it was still in use by Terminal, since that carrier had not yet relieved itself of its responsibilities for compliance with the Safety Appliance Laws as they affected that car.

By no stretch of the imagination can it be reasonably contended that the language in those opinions meant that when a railroad company pushes a car onto a track of one of its customers for the purpose of loading or unloading, that car is no longer "in use." It was the clear intention of Congress to make certain that no railroad company would be permitted to delegate unto anyone other than another railroad company its responsibilities for full compliance with the Safety Appliance Laws. Certainly it is clear that when a railroad company shunts a car onto an industrial railway siding, it is the intention of all concerned that the car he "used" for loading or unloading, and that human beings be upon that car for such operations. There is no restrictive language in the statute itself which holds that the protection afforded by the statute and the duties imposed by the statute are limited solely to employees of the railroad companies, or that such protection exists only when the car is still on a track owned by the railroad company, as distinguished from a track owned by one of its customers whose tracks directly connect with those of the common carrier.

This court had no difficulty in concluding that the Safety Appliance Act applied not merely to employees of the railroad companies. In *Fairport P. & E. R. Co. v. Meredith*, 292 U. S. 589, 54 S. Ct. 826 (1934), this court held that a passenger in an automobile at a grade crossing was still within the orbit of protection intended to be afforded by the Safety Appliance Act.

True it is that in the *Fairport* case the railroad equipment

was on the track of the railroad company. It would, however, be offensive to common sense and understanding if it could successfully be contended that the same protection does not exist when the car is pushed several hundred feet onto a private siding. Certainly the use then being made is the use contemplated by the agreement which must exist in each and every case between the carrier and its customer.

It is a matter of common knowledge and one of which this court can well take judicial notice, that every industry which receives and holds a railroad car for more than 48 hours without having either loaded or unloaded the car, as the case may be, is then charged demurrage, the charge being set forth in the schedules of the Interstate Commerce Commission, and varying according to size and type of car.* The car is thus in actual profitable use while on the tracks of the industry. Certainly a car is in use while it is actually being loaded or unloaded. It is certainly also in use when a fee is being paid by the industry for failure to return the car to the carrier's tracks within the 48-hour period.

A car can only be considered as not "in use" when it has been completely withdrawn from service, either for repairs, for junking when obsolete, or perhaps when put away on storage tracks of the carrier itself because of lack of business.

Naturally it cannot be assumed that the private industry has within its own resources the experienced men and the material adequate to cope with defects and inefficiencies in these safety appliances so peculiarly a railroad function, for which men need and receive special training, education and experience. It was never contemplated that there would exist any period when the protection intended by the statute would become inert or "in vacuo," although the car was then being used to earn a profit for the carrier.

Whereas the Interstate Commerce Commission may well be in a position to regulate the operations, installations, maintenance and repair of railroad equipment, so long as

* See Second Revised Service Order of the Interstate Commerce Commission No. 856 naming Car Demurrage Rules and Charges, Storage Rules and Charges.

the Commission can deal with a railroad company, the ability to properly exercise such power over other industries in whose hands a car may momentarily rest would be so limited, and the interpretation of the applicable laws and regulations would be so varied, that compliance with the statute would become a nullity.

The position assumed by the Supreme Court of Minnesota is one which provides an unwarranted "out" for railroad companies from their absolute responsibilities, imposed by a long line of cases which have found their way to this court and have been affirmed here. The most recent of these cases are *Carter v. Atlanta & St. Andrew's Bay R. Co.*, 338 U. S. 430 (1949); *O'Donnell v. Elgin, J. & E. R. Co.*, 338 U. S. 384 (1949); and *Affolder v. New York, C. & St. L. R. Co.*, 339 U. S. 96 (1950).

The mere fact that the plaintiff may bear the burden of proof of establishing that there was no change in the condition of the car or other equipment involved and covered by the Safety Appliance Act from the time the car left the tracks of the railroad company until the time of the accident, in no way changes the responsibility of the railroad company once such proof has been established.

To support the position assumed by the court below in this case would mean that several million miners who load and unload coal, stone and ores on railroad cars in mines, quarries, coal yards, storage docks and coal docks, would be deprived of this protection so explicitly granted in the statute and heretofore supported.

As recently as this year, in the United States District Court for the Eastern District of Pennsylvania, in the case of Brinich v. Reading Co., Civil Action No. 8702, the exact opposite was held, under similar circumstances. So, too, in *Rush v. Thompson*, 356 Mo. 568, 202 S. W. 2d 800 (1947).

Moreover, there is well-founded authority that in the absence of diversity of citizenship, the violation of a Safety Appliance Law may in itself support jurisdiction in a federal court, even though the injured be not a railroad employee (and therefore under the protection of the Federal

Employers' Liability Act), because the Safety Appliance Act is in itself a federal statute.

Not only are miners affected, but warehousemen, teamsters, stevedores and longshoremen, as well. Indeed, it is easy to suppose cases were railroad employees themselves may be involved in situations like that of the instant case and be denied, by this decision, the protection of this statute. Under this decision, such a result could follow merely because at the time of the accident the car happened to be 50 feet up the track from the point where the railroad company's tracks ended and the industry's siding began, and where there was no direct physical connection, at that instant, between a train of the railroad company and the particular car standing alone on the privately-owned siding, a short distance away.

As was said in *Fairport, P. & E. R. Co. v. Meredith*, 292 U. S. 589, at 596:

> "To confine the beneficial effect of these provisions to employees and passengers would be to impute to Congress an intention to ignore the equally important element which their enactment actually contributes to the safety of travelers at highway crossings. Since all of these three classes of persons are within the mischief at which the provisions are aimed, it is quite reasonable to interpret the statute imposing the duty as including all of them.
>
> "It fairly may be said that the nature of the duty imposed by a statute and the benefits resulting from its performance usually determine what persons are entitled to invoke its protection.
>
> * * * * * * * *
>
> "In the light of what has now been said, it follows that the duty imposed upon petitioner by the provisions of the act in respect of power controlled brakes extends to and includes travelers at railway-highway crossings."

To the same effect, see *Southern Pac. Co. v. Carson*, 169 F. 2d 734, 739 (C. C. A. 9, 1948).

In *Urie v. Thompson*, 337 U. S. 163, 69 S. Ct. 1018 (1949), the Court said, at 1035:

> "As with the Employers' Liability Act, we do not doubt that the prime purpose of the Boiler Inspection Act was the protection of railroad employees and perhaps also of passengers *and the public at large, cf. Fairport, P. & E. R. Co. v. Meredith*, 292 U. S. 689, 54 S. Ct. 826, 78 L. Ed. 1446, *from injury due to industrial accident. The safety of all those affected by railroading was uppermost in the legislative mind.*" (Emphasis supplied.)

In *Coray v. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275 (1949), where the decedent was not working on the train in question, but was on a hand-car which ran into the train which had stopped by reason of a defective braking system, the Court said, at 522:

> "First. We cannot agree with the State Supreme Court's holding that although the railroad ran its train with defective brakes it thereby 'violated no duty owing' to the decedent. That court said that the object of the Safety Appliance Act 'insofar as brakes might be concerned, is not to protect employees from standing, but from moving trains.'
>
> "We do not view the Act's purpose so narrowly. It commands railroads not to run trains with defective brakes. An abrupt or unexpected stop due to bad brakes *might be equally dangerous to employees and others as a failure to stop a train because of bad brakes. And this Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances.* Fairport, P. & E. R. Co. v. Meredith, 292 U. S. 589, 597, 54 S. Ct. 826, 829, 78 L. Ed.

> 1446. *Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment 'not from the position the employee may be in, or the work which he may be doing at the moment when he is injured.'* Brady v. Terminal R. Ass'n, 303 U. S. 10, 16, 58 S. Ct. 426, 429, 430, 82 L. Ed. 614; Louisville & N. R. Co. v. Layton, 243 U. S. 617, 621, 37 S. Ct. 456, 457, 61 L. Ed. 931. In this case where undisputed evidence established that the train suddenly stopped because of defective air-brake appliances, petitioner was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death. Davis v. Wolfe, 263 U. S. 239, 243, 44 S. Ct. 64, 66, 68 L. Ed. 284; Spokane & I. E. R. Co. v. Campbell, 241 U. S. 497, 509, 510, 36 S. Ct. 683, 689, 60 L. Ed. 1125." (Emphasis supplied.)

We are not unaware of the fact that this matter has already been before this court and that on October 8, 1951, certiorari was denied on petition of the plaintiff from the court below. This case is now again before the court on petition for re-hearing. The case escaped the attention of counsel for the various unions here intervening, who represent millions of American workers and their families. It may be anticipated that the incidence of accidents to members of these various labor groups, by reason of violations of the absolute requirements of the Safety Appliance Act pertaining to railroads, will continue unabated. If this decision is permitted to stand, the uniformity of protection intended by the Congress of the United States will be lost. Each state will decide for itself what remedy, if any, will be available to those who sustain injury by reason of the violation of these strict statutes that all, heretofore, believed protected these American workers. The rule of *absolute liability* will be diluted to a right of recovery predicated on *negligence* under Section 393, illustration 1, of the Restatement of Torts.

Much has been written, pro and con, about the advisability of this court's granting certiorari in railroad cases. We are not unaware of the comments of various members of this court in connection with Employers' Liability Act cases, suggesting that the issues involved were not of sufficient national importance to justify the grant of certiorari. We respectfully direct the court's attention to the fact that the specific question involved in *this* case has never been passed upon directly by this court, and was implicitly left open for consideration at a later date when the specific issue would be presented to the court. This specific reservation for future determination occurred when the court considered the two *Brady* cases, supra. No case in this court, until now, has yet decided this important issue.

There is a clear conflict between the opinions of the United States District Court for the Eastern District of Pennsylvania in the Brinich case, supra, and that of the Supreme Court of Minnesota in the instant case.

Whereas this court has seen fit, since 1944, to grant certiorari in more than thirty cases involving Employers' Liability Act matters, this is the first time that the position of employees whose relationship to railroading is but incidental, has come before this court; they ask for a restatement of the principles of law providing for their protection, which they had assumed they had, and heretofore considered unquestioned. At the same time the court will have the opportunity to consider a novel question so far as railroad employees are concerned, where injury occurs on cars which, at the moment of accident, are not on tracks directly owned by the railroad company.

Although certiorari has already been denied in this case, it will not be the first time that this court has seen fit to grant certiorari after it had first refused it. This court has always shown an open mind to consideration of matters of national import, affecting large segments of the public, although certiorari had previously been denied, where the significance and importance of the case was not pointed out

to the court until after its original decision to deny certiorari had been rendered. This was the case in *Hickman v. Taylor*, cert. den. 327 U. S. 808, vacated 328 U. S. 876, affirmed 329 U. S. 495 (1947). Only last week this court granted certiorari in United States v. Sacher, decided October 15, 1951, where it had originally refused certiorari, when it was pointed out to the court that matters of great moment to each and every member of the bar, as well as to civil liberties in general, theretofore undecided, were involved in that case.

Indeed, this court has, on its own motion, without a petition for rehearing, and out of time, granted certiorari and reversed, where there was brought to its attention the fact that it had previously refused certiorari in the same case and that an obvious injustice had been rendered by that decision. In *U. S. v. Shaughnessy*, 70 S. Ct. 329 (1950), this court, having previously denied certiorari to one Eichenlaub, upon consideration of another case which was affirmed upon the authority of Eichenlaub, itself vacated the order denying certiorari and heard both causes.

It is respectfully submitted, therefore, subject to the criticism that has sometimes been made in F. E. L. A. cases where the issue pertained solely to the existence or non-existence of negligence, that this case presents a fundamental question of statutory coverage not yet previously decided by this court and on which direct conflict exists in the several courts below.

To lend a deaf ear to these millions of heretofore silent and inarticulate workers would be to render them a grave injustice in the face of an express Congressional intent and, indeed, mandate, to protect them from the violation of these important statutory regulations of railroad appurtenances.

Respectfully submitted,

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Counsel for Amici Curiae.

ADDENDUM.

Since the printing of this brief, our attention has been drawn to the case of *Patton v. Baltimore & Ohio R. Co.*, 99 F. Supp. 455 (U. S. D. C., W. D., Pa., decided September 30, 1951), in which the factual picture exactly parallels the one in the instant case. There, too, an employee of a slag company was unloading a car on his employer's private siding. He was working at the bottom of a hill when, due to an alleged violation of the federal Safety Appliance Act, four slag cars owned by the railroad company and placed where they were by the slag company, began to roll downhill and crashed into other cars at the foot of the slope, resulting in fatal injury to the slag company employee. Suit was brought against the railroad company under the Pennsylvania death statute and under the federal Safety Appliance Act. There, too, it was argued that the Safety Appliance Act was not applicable because the deceased was not an employee of the railroad company and the car was not "in use." Said the Court, at page 457:

> "At the trial, B. & O. pressed the legal argument that, since deceased was not an employee of B. & O., the federal Safety Appliance Act could not be here invoked in favor of his administratrix' complaint. Any such restrictive application of legislation like the federal Safety Appliance Act I should be most reluctant to adopt. Fortunately, the law is clear that non-employees within the circle of risk are also covered by the Act. See Fairport, P. & E. R. Co. v. Meredith, 1934, 292 U. S. 589, 54 S. Ct. 826, 78 L. Ed. 1446."

A clearer conflict between the decisions in the instant case and any other case which involves precisely the same

question of law, could not be presented to this Court, nor could any case speak more eloquently for the grant of certiorari here.

Respectfully submitted,

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